St. Mary's Law Journal

Volume 34 | Number 1 Article 3

1-1-2002

Making Sense of Pretext: An Analysis of Evidentiary Requirements for Summary Judgment Litigants in the Fifth Circuit in Light of Reeves v. Sanderson Plumbing Prodcuts, and a Proposal for Clarification.

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MAKING SENSE OF PRETEXT: AN ANALYSIS OF EVIDENTIARY REQUIREMENTS FOR SUMMARY JUDGMENT LITIGANTS IN THE FIFTH CIRCUIT IN LIGHT OF *REEVES v. SANDERSON PLUMBING PRODUCTS*, AND A PROPOSAL FOR CLARIFICATION

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I. INTRODUCTION

"Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job."[1]

1. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985) (citation omitted), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

On June 12, 2000, a little more than two years ago, the Supreme Court decided *Reeves v. Sanderson Plumbing Products, Inc.*,[2] and attempted to clarify the summary judgment landscape of Title VII employment discrimination cases.[3] To date, however, the impact of *Reeves* is still manifesting itself in the lower courts, and the extent to which *Reeves* had a meaningful impact is open to debate.[4] In *Reeves*, the Court softened the evidentiary burden of proof required for employment discrimination plaintiffs to avoid summary judgment.[5] The Court did so by holding that plaintiffs, after proving a *prima facie* case of discrimination, can avoid summary judgment by providing sufficient evidence that the employer's asserted nondiscriminatory justification for an adverse employment action is false.[6] Under *Reeves*, direct proof of discrimination is not required, at least in theory, to defeat a motion for summary judgment as long as the circumstantial evidence allows a reasonable inference of discrimination.[7]

Reeves gave many plaintiffs hope that their often difficult to prove discrimination cases might find life beyond the summary judgment phase of litigation.[8] However, the Court complicated matters when it opined that some *prima facie* cases of discrimination will not survive summary judgment when the record is completely devoid of evidence of discrimina-

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2. 530 U.S. 133 (2000).

3. *See* Kim J. Askew, Reeves v. Sanderson Plumbing Products, Inc. *(Is Pretext-Plus Really Gone?)*, VPB0919 A.L.I.-A.B.A. 457, 465 (2000) (stating that *Reeves* is an important case whose true impact will be determined in the district and circuit courts as they apply the decision); David L. Gregory, *The Supreme Court's Labor and Employment Law Jurisprudence, 1999-2001*, 36 TULSA L.J. 515, 521 (2001) (stating "Reeves thus provides plaintiffs with a much more viable evidentiary alternative than the former requirement that they must have actual proof of the employer's discrimination").

4. *See* Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 753-54 (2001) (noting that *Reeves* has not been interpreted by all circuits, and that each has found language within the opinion to support its individual view regarding the level of evidence plaintiffs must provide to avoid summary judgment).

5. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (stating "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").

6. *Id.*

7. *See id.* at 148-49 (allowing for a variety of evidence to support the plaintiff's case to defeat summary judgment).

8. *See* Marcia Coyle, *Dismissal of Bias Suits Harder New High Court Bias Ruling May Spark More Jury Trials Settlements*, NAT'L L.J., June 26, 2000, at B1 (expressing the hope of some practitioners that employment discrimination cases will become easier to prosecute); Jake Richardson, *Workplace Woes: Plaintiff's Bar Finds the Going is Tough in Employment Cases*, LEGAL TIMES, June 19, 2000, at 14 (noting that plaintiff's lawyers hope to fare better in light of *Reeves*).

tion.[9] With this caveat, the court simultaneously made it easier for plaintiffs to avoid summary judgment while implying that some evidence of discrimination beyond pretext could be required.[10] Although *Reeves* clearly stated that the plaintiff is not required to provide direct proof that discrimination actually motivated the employer at the summary judgment stage, it is clear that the strength of the circumstantial evidence remains a major issue.[11] The question still unanswered is exactly how much evidence of pretext is enough to avoid summary judgment, and what type of circumstantial evidence will suffice.[12] According to some Fifth Circuit opinions, *Reeves* changed very little in this regard.[13]

Since *Reeves* was decided, the Fifth Circuit has been hesitant in conclusively stating its summary judgment standard. Some opinions clearly raise the pre-*Reeves* pretext plus standard, which requires plaintiffs to show that the proffered nondiscriminatory reason for the adverse employment action was pretextual as well as provide evidence of discrimination.[14] Other decisions take a more progressive view in light of *Reeves* and state a standard that allows the jury to infer discrimination from circumstantial proof of pretext.[15] This situation makes it difficult for federal district courts and practitioners trying cases in the Fifth Circuit to ascertain the correct standard.

The Fifth Circuit's ambiguity on the issue has created difficulty at the federal district court level, forcing these courts to choose, either con-

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9. *See Reeves*, 530 U.S. at 148 (explaining that not all combined evidence cases will be sufficient to allow a jury to find liability). There will be combined evidence cases where the plaintiff has not put forth sufficient evidence such that the trier of fact might conclude that discrimination was the motivating factor for the employer. *See id.*

10. *See id.*

11. *See id.* at 146-47 (holding that the appellate court in *Reeves* did not interpret the plaintiff's evidentiary burden in light of *St. Mary's Honor Ctr.*).

12. *See id.* at 154 (Ginsburg, J., concurring) (predicting that future clarification could be required from the Court to determine the circumstances where plaintiffs might be required to submit evidence beyond that required under the *Reeves* decision).

13. *See* Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.23 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001), *and* 531 U.S. 1150 (2001) (stating the Fifth Circuit belief that *Reeves* did not affect law applicable to the case, and that its decision in *Reeves* was merely inconsistent with prior precedent within the circuit).

14. *See* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001) (holding that even when the plaintiff demonstrates pretext, discrimination suits still require the plaintiff to provide evidence of discrimination to survive summary judgment).

15. *See* Blow v. City of San Antonio, 236 F.3d 293, 297-98 (5th Cir. 2001) (stating the *Reeves* standard that evidence of the falsity of the employer's nondiscriminatory justification can be probative of discrimination, and sufficient to avoid summary judgment).

sciously or blindly, which *Reeves* interpretation to follow.[16] As a practical matter, practitioners need to know two things regarding the *Reeves* summary judgment issue when arguing their motions in district court: (1) what the summary judgment burden of proof standard is in the Fifth Circuit in light of *Reeves*; and (2) how that standard is being interpreted and applied. This comment will seek to provide solutions to this complex problem.

Given the storied history and complexity of Title VII burden of proof allocations, the analysis will begin by tracing the evolution of summary judgment standards in the Fifth Circuit. Part II of the paper will shift its focus to the post-*Reeves* decisions in the Fifth Circuit, and will analyze some of the key opinions utilizing a framework that provides practical information as to the standard being applied, and the manner in which the court is doing so. The ultimate goal is to tell the reader, in rather specific terms, what to expect in the Fifth Circuit when bringing or defending a Title VII case.

II. BACKGROUND

Between 1963 and 1990 several significant pieces of federal legislation were enacted to protect certain classes of individuals from overt discrimination in the work place. In 1964, the United States Congress enacted Title VII of the Civil Rights Act,[17] which made it illegal to discriminate against protected classes of people in the work place.[18] Shortly thereafter, Congress also passed the Age Discrimination in Employment Act ("ADEA"),[19] which protects older workers from discriminatory employment practices.[20] A third major piece of legislation in the area of employ-

16. *Compare* Baker v. Union Pacific R.R., 145 F. Supp. 2d 837, 842 (S.D. Tex. 2001) (citing an opinion regarding summary judgment which states that "[i]n order to preclude a grant of summary judgment, the plaintiff must produce sufficient factual evidence to permit a rational trier of fact to find that the employer's explanation for its decision is a pretext and that unlawful discrimination was the real motivation"), *with* Yelverton v. Graebel/Houston Movers, Inc., 121 F. Supp. 2d 604, 609 (E.D. Tex. 2000) (stating that the plaintiff meets his burden of establishing an issue of fact regarding intentional discrimination by showing that the employer's proffered nondiscriminatory justification for the adverse action is false).

17. 42 U.S.C. §§ 2000e to 2000e-16 (1994 & Supp. 2000).

18. *See id.* § 2000e-2(a). The statute states:

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

19. 29 U.S.C. §§ 621-634 (1999 & Supp. 2001).

20. *See id.* § 623(a). The statute states:

ment discrimination came in 1990 when Congress passed the Americans with Disabilities Act ("ADA"),[21] rendering workplace discrimination on the basis of physical disabilities illegal as well.[22] While the goal was noble, these statutes created a new vehicle for plaintiffs' lawsuits which began to crowd federal court dockets.[23] Inevitably, many of these suits were without merit, and courts began to look for ways to dispose of these claims.[24] Accordingly, summary judgment became a popular means for clearing dockets, and disposing of many of these cases.[25]

A. *Summary Judgment*

Summary judgment was first utilized in 1879 when the United States Supreme Court conceived summary procedures.[26] Initially, courts did not favor summary judgment, particularly in the arena of employment

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> [i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

21. 42 U.S.C. §§ 12101-12213 (1995 & Supp. 2001).

22. *See id.* § 12112(a) (stating that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment"). *Id.*

23. *See* Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 37 (2000) (stating that discrimination cases occupy a growing proportion of the case dockets in the federal district courts).

24. *See* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 142-43 (2000) (noting that the number of trials in federal courts has declined, but has done so in the face of large increases in cases pending before district courts); Marcia Coyle, *How to Judge Age Bias Justices Mull Two Key Questions of Proof in Potential Landmark*, NAT'L L.J., Mar. 20, 2000, at A1 (noting that recent statistics indicate that "employment discrimination cases accounted for 65% of the overall increase" in civil rights complaints which climbed from 18,793 in 1990 to 42,354 in 1998).

25. *See* John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* 4 LAB. LAW. 747, 795 (1988) (concluding that summary judgment has become a viable tool for adjudicating meritless cases without a trial).

26. Fid. & Deposit Co. of Md. v. United States *ex rel.* Smoot, 187 U.S. 315, 320 (1902) (noting that as early as 1879 the Supreme Court had ruled favorably on the issue of summary judgment).

discrimination, and were loathe to approve of it.[27] The procedure is characterized as arbitrary by some and efficient by others, but regardless of which philosophy one subscribes to, the standards are well established in Supreme Court precedent.[28] The Court no longer harbors ill feelings toward summary procedures.[29] To the contrary, in a series of three landmark decisions, the Supreme Court has made summary judgment fundamentally easier for defendants, and increased the burden of proof required for plaintiffs claims to survive.[30]

Rule 56 of the Federal Rules of Civil Procedure expressly assigns nonmovants responsibility for countering motions for summary judgment.[31] However, courts initially ignored this rule, and assigned the movant responsibility for showing that the nonmovant had failed to affirmatively support his claim or defense.[32] In the first of three cases affectionately referred to as the "trilogy," *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[33] the Supreme Court held that parties who

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27. *See* Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (stating that summary judgment should be used infrequently in complex antitrust cases where motive and intent play an important role since the proof is often in the hands of the conspirators); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 640-41 (5th Cir. 1985) (stating that generally summary judgment is an inappropriate tool for settling claims of employment discrimination), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940) (stating that summary judgment was not intended to and should not deprive a litigant of his right to a trial by jury).

28. *Compare* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (citing the Supreme Court's 1986 summary judgment cases as having a devastating effect on civil rights law), *with* William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 451 (1991) (concluding that summary judgment is a procedure that prevents unnecessary trials on bad claims and also serves the role of identifying and narrowing issues).

29. John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747, 762 (1988) (discussing the Court's holdings in three cases and clarifying the standards by which to evaluate motions for summary judgment).

30. *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

31. FED. R. CIV. P. 56(c) states that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

32. John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747, 762-63 (1988).

33. 475 U.S. 574 (1986).

move for summary judgment are not required to show a total lack of evidence in support of their opponent's claim.[34] Rather, the nonmovant must establish, as stated in the rule, the existence of a genuine issue for trial.[35]

Celotex v. Catrett[36] elaborated upon this standard three months later when the Court articulated that summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case."[37] More significantly, *Celotex* established alternating burdens of proof for summary judgment litigants,[38] and affirmed that movants are required to do nothing more than point out a lack of any evidence to support the adverse party's case.[39] It is now quite clear that the party opposing summary judgment must in fact show that a material issue exists for trial.[40]

Finally, *Anderson v. Liberty Lobby, Inc.*,[41] decided on the same day as *Celotex*, established the evidentiary standards trial judges must follow when evaluating motions for summary judgment.[42] *Anderson* establishes conclusively that the mere existence of some fact issue is not enough to avoid summary judgment.[43] There must be, as in the words of Rule 56(c),

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34. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (stating "[i]n the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*'") (alteration in original); John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* 4 LAB. LAW. 747, 763 (1988) (explaining that in light of *Matsushita* and *Celotex*, movants are no longer saddled with the evidentiary burden of proof).

35. FED. R. CIV. P. 56(e); *Matsushita*, 475 U.S. at 587. The rule states explicitly:

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Id.

36. 477 U.S. 317 (1986).

37. Celotex v. Catrett, 477 U.S. 317, 322 (1986).

38. *See id.* at 323-24 (discussing the burden of proof allocations at summary judgment).

39. *Id.* at 323, 325.

40. *Id.* at 324 (noting that a nonmoving party must articulate specific facts to show that a genuine issue exists for trial).

41. 477 U.S. 242 (1986).

42. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (stating that the inquiry is whether heightened evidentiary requirements regarding malice need to be considered in a motion for summary judgment); John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* 4 LAB. LAW. 747, 767 (1988) (noting that *Anderson* presented the Supreme Court with the issue of evidentiary standards).

43. *Anderson*, 477 U.S. at 247-48.

a "*genuine* issue" as to a "*material* fact."[44] Summary judgment will only be defeated in the presence of evidence that allows a reasonable jury to return a verdict for the nonmovant on facts affecting the outcome of the lawsuit.[45]

The final and perhaps the most crucial point of *Anderson*, in terms of employment discrimination, is its stance on the element of intent at the summary judgment stage.[46] In *Anderson*, the majority explained that although intent was an element of the cause of action, the plaintiffs could not avoid summary judgment by merely asserting that the jury might not believe the defendant's denial of intent.[47] Thus, even when intent is an issue in an employment discrimination case, the nonmovant must still produce concrete evidence from which a juror can conclude in his favor.[48] Since there is often no "smoking gun" in a discrimination case, dealing with the issue of intent is extremely important at summary judgment.[49]

B. McDonnell Douglas *and* Burdine—*The Burden Shifting Framework*

The *Matsushita*, *Celotex*, and *Anderson* cases established the impetus behind many of today's burden of proof and evidentiary requirements in employment discrimination cases.[50] As alluded to above, the difficulty in employment discrimination cases does not arise when there is infinite evidence of invidious activity on the part of an ill intentioned employer.[51] Rather, the moving target confronting the courts is what to do when circumstantial evidence is employed and there is little or no direct proof of

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44. *Id.* (emphasis added).

45. *See id.* at 248-49 (defining and explaining the terms "genuine" and material in the context of rule 56(c)).

46. *Id.* at 255-56 (declaring that a plaintiff must show malice by clear and convincing evidence).

47. *Id.* at 256.

48. *See Anderson*, 477 U.S. at 256 (asserting that the non movant in a summary judgment motion must provide evidence that would support a jury verdict).

49. *See* Holtz v. Rockefeller & Co., 258 F.3d 62, 76 (2d Cir. 2001) (declaring that the jury was entitled to infer age discrimination from evidence presented at trial); Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1303 (7th Cir. 1990) (stating that to show discriminatory intent a plaintiff must establish a prima facie case of discrimination first).

50. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 228-29 (1993) (asserting that the loosening of summary judgment standards by the Supreme Court has prompted federal courts to affirm district court summary judgment orders).

51. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (stating that the *McDonnell Douglas* burden shifting framework is inapplicable in cases where direct evidence of discrimination is available, and that the burden shifting framework exists in order to ensure that plaintiffs are heard in court even though they may lack direct evidence of discrimination).

discrimination.[52] The Supreme Court fashioned a burden-shifting framework to deal with such cases in the landmark decision, *McDonnell Douglas Corp. v. Green*.[53]

In *McDonnell Douglas*, the plaintiff, a black civil rights activist, was fired for allegedly engaging in disruptive protests that blocked traffic to and from a 30,000-person facility.[54] When the plaintiff sought re-employment, he was turned down based on participation in the protests and subsequently filed suit under Title VII of the Civil Rights Act of 1964.[55]

The Supreme Court, noting that cases such as this one inevitably involve plaintiffs charging illegal discrimination and defendants denying the same, established a three step framework for adjudicating such cases.[56] First, the plaintiff must establish a prima facie case of discrimination by showing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[57]

If these elements are met, a prima facie case is established, and the second step of the burden shifting framework comes into play. Here, the burden shifts to the employer to provide a legitimate nondiscriminatory justification for the adverse employment action.[58] If the defendant is successful in rebutting the plaintiff's prima facie case, the third and final step of the *McDonnell Douglas* framework is in issue, and the burden shifts back to the plaintiff to show that the defendant's articulated nondiscriminatory reason for the adverse action was pretextual.[59] This framework is applied not only to private actions involving individuals under Title VII, as in *McDonnell Douglas*, but also to pattern and practice cases brought by the federal government, as well as cases brought under the Age Dis-

52. *See* Gale Keane Busemeyer, Comment, *Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof*, 21 CONN. L. REV. 99, 102 (1988) (noting that ADEA cases frequently rely on circumstantial evidence and do not generally have readily identifiable evidence of discrimination).

53. 411 U.S. 792 (1973).

54. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 795 (1973).

55. *Id.* at 796.

56. *See id.* at 801 (noting that the issue in a discrimination trial is framed by the parties' factual contentions).

57. *Id.* at 802.

58. *Id.* at 802-03.

59. *McDonnell Douglas Corp.*, 411 U.S. at 804-05.

crimination and Employment Act.[60] However, this framework does not apply to cases where there is direct evidence of discrimination.[61]

While extremely useful in providing guidance to litigants, *McDonnell Douglas* needed clarification that came affirmatively in *Texas Department of Community Affairs v. Burdine*.[62] The narrow question presented in *Burdine* was whether defendants, in rebutting the plaintiff's prima facie case with a legitimate nondiscriminatory justification, were required to prove the proffered justification by a preponderance of the evidence.[63] The Court held that the defendant does not have to convince the trier of fact that the stated reasons motivated it.[64] Instead, the employer must merely raise a genuine issue of fact by the introduction of admissible evidence that shows the reason for the adverse action against the plaintiff.[65] This is a burden of production only and the defendant is not required to persuade the trier of fact that the adverse action was nondiscriminatory.[66]

Also significant to *Burdine* was the Court's clarification of the burden of persuasion placed upon the plaintiff in proving that the asserted nondiscriminatory justification was pretextual.[67] The Court clearly stated that the plaintiff might do so by persuading the trier of fact that discrimination was the employer's motivation, or alternatively by showing that the employer's nondiscriminatory justification is "unworthy of credence."[68] It is with this issue that the circuit and district courts are struggling today.

C. St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products—*Attempts at Clarification*

Discriminatory intent is the crux of all employment discrimination claims at the summary judgment stage.[69] In *Burdine*, the Court noted

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60. *See id.* at 800 (expressing that the critical issue in Title VII cases is the "order and allocation of proof" in a private action involving employment discrimination); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 357-61 (1977) (applying the *McDonnell Douglas* framework to a pattern and practice case involving a class action); Hamilton v. Grocers Supply Co., 986 F.2d 97, 98-99 (5th Cir. 1993) (applying *McDonnell Douglas* to a claim brought under the ADEA).

61. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

62. 450 U.S. 248 (1981).

63. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 250 (1981).

64. *Id.* at 254.

65. *Id.* at 254-55.

66. *Id.* at 257.

67. *Id.* at 256.

68. *Burdine*, 450 U.S. at 256.

69. Lewis v. Glickman, 104 F. Supp. 2d 1311, 1315 (D. Kan. 2000); *see also* Boehms v. Crowell, 139 F.3d 452, 459 (5th Cir. 1998) (stating that while acceptance of an employee's own evaluation of qualifications does not allow the trier of fact to ascertain that the em-

that employers have the clear discretion to deal with employees and potential employees however they wish, as long as their decision is not based upon unlawful criteria.[70] For example, just because an employer may have misjudged the qualifications of applicants does not in and of itself create liability.[71] It may, however, be probative of whether the nondiscriminatory justifications offered by the employer are pretextual.[72] Thus, *Burdine* instructs that intent and motive, both of which are difficult to prove, play a key role in the *McDonnell Douglas* framework and frequently require the trier of fact to make inferences.[73]

While *Burdine* focused on the defendant's burden in the *McDonnell Douglas* framework, *St. Mary's Honor Center v. Hicks*[74] addressed the plaintiff's burden in ultimately proving intentional discrimination.[75] In *Hicks*, the Court spoke to whether a plaintiff's showing that the employer's asserted nondiscriminatory justification is false compels a verdict for the plaintiff.[76] Here, the district court found that while all of the asserted nondiscriminatory justifications offered by the defendant were false, the plaintiff had failed to carry his burden of establishing that race was the motivating factor in the employer's actions.[77] The Eighth Circuit reversed, holding that once the plaintiff proves that all of the asserted justifications are false, the plaintiff is entitled to judgment as a matter of law.[78]

Justice Scalia, writing for the majority, took umbrage with the Eighth Circuit's interpretation of *Burdine*, and instead held that a trier of fact's disbelief of a defendant's nondiscriminatory justification does not *compel* judgment for the plaintiff.[79] However, it is *possible* for a plaintiff to prevail without direct evidence by combining the elements of a prima facie

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ployer's justification for an adverse action was pretextual, the existence of other evidence, such as ages of co-employees, may support a finding of discrimination).

70. *Burdine*, 450 U.S. at 259.

71. *Id.*

72. *Id.*

73. *See id.* (stating that "[t]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria"). Furthermore, the Court stated "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Id.*

74. 509 U.S. 502 (1993).

75. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504 (1993) (framing the issue in the case as that of determining whether "the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff").

76. *Id.*

77. *Id.* at 508.

78. *Id.* at 508-09.

79. *Id.* at 511.

case with the fact finder's disbelief of the defendant.[80] While *Hicks* does not seem to require specific evidence of discrimination from the defendant in addition to proof of pretext, dicta alludes to such a requirement.[81] Scalia specifically notes that there is nothing in prior precedent that would allow the Court to substitute the requirement of a finding of unlawful discrimination with a finding that the defendant's stated reasons for its action were simply unbelievable.[82] If this is the case, a finding for the plaintiff is illogical without direct evidence of discrimination.[83]

At a minimum, *Hicks* modified the *McDonnell Douglas* paradigm, and imposed a proof standard that made it more difficult for plaintiffs to prevail.[84] However, since the Court was not clear as to the level and type of proof required, the circuit courts continued to apply varying standards. From the rendering of *Hicks* in 1993, the next major pronouncement did not come until 2000 when the court decided *Reeves v. Sanderson Plumbing Products*,[85] a case brought under the Age Discrimination and Employment Act ("ADEA").[86] A commentator anticipated that *Reeves* would shed light on the murky waters of summary judgment standards in employment discrimination cases.[87] With *Hicks* holding that proof of pretext can, but does not necessarily allow judgment for the plaintiff, and dicta indicating that specific evidence of discrimination may still be required, many were left wondering where the bar fell.[88]

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80. *Hicks*, 509 U.S. at 511.

81. *Id.* at 514-15.

82. *Id.*

83. *See id.* at 515-16 (explaining the criteria for pretext).

> [A] reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. *Burdine's* later allusions to proving or demonstrating simply "pretext," *e.g.*, . . . are reasonably understood to refer to the previously described pretext, *i.e.*, "pretext for discrimination."

Id. (alteration in the original) (citations omitted).

84. *See* Leland Ware, *Inferring Intent From Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 37, 56 (2000) (noting the impact of the holding in *Hicks*).

85. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

86. *See generally* 29 U.S.C. §§ 621-634 (1999 & Supp. 2001).

87. *See* Marcia Coyle, *High Court to Consider Questions of Proof for Age Bias Suits*, NAT'L L.J., Mar. 16, 2000, at 5 (quoting Paul Mollica as stating "[w]hat the court decides in *Reeves*, unless it goes off on tangents, will be cited in every employment case" as the standard).

88. *See* Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 747 (2001) (explaining that after *St. Mary's Honor Center v. Hicks*, the lower

Reeves was an appeal from the Fifth Circuit which had held that the petitioner had not provided sufficient evidence of discrimination, although evidence sufficient to prove pretext may well have been offered.[89] In *Reeves*, the Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[90] Thus, the Court clarified *Hicks* and stated conclusively that independent and specific evidence of discrimination is not necessarily required for a plaintiff to survive summary judgment.[91] However, the Court also stated in *Reeves* that such a showing will not always suffice.[92] If no rational trier of fact could find the employer's actions discriminatory, then the plaintiff should not prevail.[93] The Court gave examples of such a situation, such as the existence of an alternate nondiscriminatory justification for the employer's decision, or a particularly weak fact issue as to the untruth of the employer's justifications combined with abundant evidence that there was no discrimination.[94]

Therefore, after *Reeves*, one thing is quite clear: a plaintiff can prevail at summary judgment by proving by a preponderance of the evidence that the employer's proffered nondiscriminatory justification is false or pretextual.[95] The real question that remains is exactly where to draw the evidentiary line regarding proof of pretext.

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courts remain in a state of flux regarding their interpretation of the level of proof required to survive summary judgment).

89. *Reeves*, 530 U.S. at 139.

90. *Id.* at 148.

91. *See id.* (explaining that when all legitimate reasons offered by an employer have been eliminated by the plaintiff, and assuming that an employer generally acts with some motivation, the remaining considerations that formed the basis for the employment action are likely impermissible).

92. *See id.* (stating that "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory").

93. *Id.*

94. *Reeves*, 530 U.S. at 148.

95. *See* Tamara Loomis, *'Pretext Plus' Rejected Employment Discrimination Landscape Changed*, N.Y. L.J., June 22, 2000, at 5 (explaining that *Reeves* lowered the burden for plaintiffs by holding that and employer may be held liable when the plaintiff proves a prima facie case and also shows that the employer's stated justification was not the real reason for the adverse employment action); Edward K. Newman & Julie Richard-Spencer, *Supreme Court Approves Use of Indirect Evidence to Prove ADEA Violations*, 48 LA. B.J. 162, 163 (2000) (reporting that the Supreme Court believed that the Fifth Circuit erred when it held that the trier of fact's rejection of the employer's proffered nondiscriminatory justification, combined with a prima facie case of discrimination, is insufficient to support a finding that intentional discrimination occurred); Xavier Rodriguez, *Have Discrimination Cases Gotten More Difficult?*, TEX. LAW., Aug. 28, 2000, at 18 (noting that the Supreme

III. ANALYSIS

As stated previously, the purpose of this analysis is not to present a treatise on employment discrimination jurisprudence. Rather, the goal is to provide practical information to practitioners in the Fifth Circuit regarding the burden of proof requirements when moving for or defending a summary judgment motion in federal court. However, in order to understand the current state of affairs, it is important to understand how the Fifth Circuit case law regarding summary judgment in employment discrimination cases has evolved, and where it now stands post-*Reeves*.

A. *The Historical Background to* Reeves *in the Fifth Circuit*

It is no secret that the Fifth Circuit is not the happy hunting ground for plaintiffs' attorneys bringing employment discrimination suits.[96] However, this has not always been the case. Prior to the Supreme Court's promulgation of revised summary judgment standards in *Matsushita*, *Celotex*, and *Anderson*, the Fifth Circuit was actually quite adverse about the idea of using summary procedures.[97]

The pre-*Celotex* attitude in the Fifth Circuit is best illustrated by *Whitaker v. Coleman*, a case where the Fifth Circuit stated unequivocally its belief that summary procedures were not intended to encroach upon the right to a trial by jury.[98] The Fifth Circuit was in line with the Supreme Court, who before *Celotex*, also took a dim view of summary judgment in cases where motive and intent are significant issues.[99] Surprisingly, as recently as 1985 the Fifth Circuit looked with a jaundiced eye at the use of summary procedures in ADEA cases.[100] For example, in *Thornbrough*

Court has held that a jury, from the untruthfulness of the employer's proffered justification, may infer the presence of discrimination).

96. *See* John Council, *5th Circuit Batted .333 at High Court*, TEX. LAW., July 17, 2000, at 1 (naming the Fifth Circuit as one of the most conservative circuits in the nation).

97. *See* Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940) (espousing a then held belief that summary procedures were not intended to encroach upon the right to a trial by jury).

98. *Id.*; *see also* Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5th Cir. 1979) (stating that when motive and intent are an issue, as with employment discrimination cases, the granting of summary judgment is questionable, and should be utilized with great caution).

99. *See* Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (stating the belief of the Supreme Court that summary procedures should be seldom employed in cases where motive and intent are key issues, and where the evidence is largely in the hands of the alleged wrong doers).

100. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 640-41 (5th Cir. 1985), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The Court states:

> [i]n general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. Often, motivation and intent can only be proved through circumstantial evidence; de-

v. Columbus & Greenville Railroad, the Fifth Circuit articulated its pre-*Celotex* view on summary judgment in employment discrimination cases by stating unequivocally that summary judgment is inappropriate as a vehicle for disposing of these claims.[101]

By contrast, the Fifth Circuit's first ADEA summary judgment case after *Matsushita, Celotex*, and *Anderson* takes a much different view. In *Slaughter v. Allstate Insurance Co.*,[102] an ADEA case arising from the Southern District of Texas, the court no longer appears to lose sleep over issues of motivation and intent.[103] The court cited *Anderson v. Liberty Lobby, Inc.* and held that when evidence is as weak as the plaintiff's, the court cannot preclude summary judgment.[104] It appears, therefore, that the Fifth Circuit had a significant change in philosophy after the summary judgment standards loosened at the Supreme Court level.

It is also significant that the Civil Rights Act of 1991 increased the employer's need for summary judgment procedures by allowing jury trials in disparate treatment cases.[105] Prior to the enactment of this legislation, these cases were adjudicated with bench trials.[106] The 1991 legislation provided for not only jury trials, but also compensatory and punitive damages.[107] Naturally, defendants were given an extremely strong incentive to seek pre-trial adjudications, rather than risk large jury awards.[108]

B. *The Analytical Framework*

In order to make sense of burden of proof allocations in the Fifth Circuit, it is first necessary to establish a framework with which to analyze the decisions. Specifically, under the *McDonnell Douglas* and *Burdine* burden-shifting analysis, cases are generally won or lost in the third and final pretext phase, where the plaintiff is called upon to show that the

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terminations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder.

Id. (citation omitted).

101. *Id.*

102. 803 F.2d 857 (5th Cir. 1986).

103. *See* Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860-61 (5th Cir. 1986) (iterating that a party opposing a motion for summary judgment in an age discrimination claim must make a sufficient showing on an element essential to the case and establish the existence of a "genuine issue for trial" in order to avoid summary judgment), *abrogation recognized by* Sarmiento v. Tex. Bd. of Veterinary Med. Exam'rs *ex rel.* Avery, 939 F.2d 1242 (5th Cir. 1991).

104. *Id.* at 861.

105. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2278 (1995).

106. *Id.*

107. *Id.*

108. *Id.* at 2278-79.

defendant's proffered nondiscriminatory reason for the adverse employment decision is a pretext for discrimination.[109] At this point in the trial, the question for the fact finder becomes whether the plaintiff's combined evidence, the previously established prima facie case plus proof that the employer's proffered justification is false, supports a finding of discrimination.[110] In the summary judgment context, the question is whether this combined evidence allows a reasonable fact-finder to side with the plaintiff.[111] How this question is answered is, and has been, the center of the controversy.[112]

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109. *See Thornbrough*, 760 F.2d at 639 n.6 (stating that "most disparate treatment cases are resolved at the third stage of the inquiry, on the issue of whether the defendant's reasons are pretextual").

110. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2305-06 (1995).

111. *Id.*

112. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 137 (2000) (noting specifically that the controversy before the Court in that case was "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action"); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (stating that although rejecting the defendant's proffered nondiscriminatory justification for the adverse employment action will permit an inference of discrimination, it does not compel any such finding, and the plaintiff at all times bears the burden of persuading the trier of fact); Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993) (noting that in a case where indirect evidence supporting an ADEA claim is intermingled with other separate, but related claims, indirect evidence can suffice to allow a finding of liability and fulfill the plaintiff's burden to prove that the employee's protected trait was what motivated the employer); Patterson v. McClean Credit Union, 491 U.S. 164, 186 (1989) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) for the proposition that the *McDonnell Douglas* burden shifting scheme is a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); *id.* at 187-88 (holding that the district court had erred in its instruction to the jury which would have required a showing by the plaintiff that she was more qualified for the position than the person actually chosen); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989) (holding that the Court's decision regarding the defendant's burden in situations wherein direct evidence of discrimination is presented does not affect the previous holding in *Burdine* that the burden of persuasion does not shift to the employer, only a duty to provide a legitimate nondiscriminatory justification); Mato v. Baldauf, 267 F.3d 444, 452 (5th Cir. 2001) (holding that in a case of discriminatory retaliation, where no direct evidence of discrimination is presented, plaintiff is required to present "sufficient evidence" of discriminatory animus as required by *Reeves*); *id.* (citing *Deines v. Tex. Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) for the proposition that anti-discrimination laws "[are not] vehicles for judicial second-guessing of business decisions") (alterations in original); Pratt v. City of Houston, 247 F.3d 601, 606-07 (5th Cir. 2001) (citing *Vadie v. Miss. State Univ.*, 218 F.3d 365, 373 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001) in stating that summary judgment is inappropriate "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable in-

There are three ways to slice the combined evidence pie.[113] First, one might offer that the trier of fact always has discretion to hold in favor of the plaintiff when presented with combined evidence, but the inference created by the combined evidence is purely permissive.[114] This is sometimes referred to as the "judgment for plaintiff always permitted" position.[115] Alternatively, another point of view holds that combined evidence will allow the fact finder to infer discrimination in some instances but not others.[116] In other words, if the defendant is caught in an obvious lie, discrimination might be properly inferred, but if he merely failed to effectively present a case or was ineffective in administering lawful personnel policies, an inference of discrimination might not be proper.[117] This is referred to as the "judgment for plaintiff sometimes permitted" position.[118] Finally, a third alternative holds that the combined evidence, without other evidence of discrimination, is never sufficient to defeat a claim for summary judgment.[119] Additional evidence is always required in order for a plaintiff to sustain a case. This is referred to as the "judgment for defendant required" position.[120]

When evaluating the treatment of the *McDonnell Douglas-Burdine* framework under *Reeves*, it is important to ascertain not only the court's choice of a position as to combined evidence, but also how that court tends to rule when presented with varying levels of additional evidence

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ference that [race] was a determinative factor in the actions of which plaintiff complains"); Crawford v. Formosa Plastics Corp., 234 F.3d 899, 903 (5th Cir. 2000) (citing *Walton v. Bisco Indus.*, 119 F.3d 368, 372 (5th Cir. 1997) for the proposition that if pretextual evidence presented by the plaintiff is substantial, a fact issue sufficient to survive summary judgment can be created, even without other evidence that discrimination was the employer's motivation); Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1091 n.6 (5th Cir. 1995) (noting that in the parties' briefs, arguments were presented and defended against regarding the ability of a plaintiff to rebut defendant's proffered nondiscriminatory justification for an adverse employment action with only a showing of noncredibility and absent any direct proof, and further noting that the court would soon consider whether this rebuttal, in conjunction with the prima facie case, would suffice to meet plaintiff's burden at summary judgment).

113. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2306 (1995) (setting forth a framework for analyzing circumstantial cases of disparate treatment in light of *Hicks*).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2306 (1995) (setting forth a framework for analyzing circumstantial cases of disparate treatment in light of *Hicks*).

119. *Id.*

120. *Id.*

beyond that presented in the combined evidence case.[121] The question is what additional evidence, if any, the Court might require, and how strong the additional evidence must be.[122] This is difficult to answer, because the combined evidence varies in strength from case to case, as does the Court's willingness to rely on it.[123] There is a fundamental difference between a combined evidence case where the defendant deceptively lies

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121. *Compare* Rios v. Rossotti, 252 F.3d 375, 379 (5th Cir. 2001) (explaining that although plaintiff had evidence in support of a discrimination in hiring claim that supervisors made insensitive and racially degrading remarks and affidavits established an atmosphere that was hostile toward Hispanic workers, plaintiff failed to meet her burden of showing that defendant's proffered reason for not hiring plaintiff was a pretext for discrimination), *and* Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 404 n.7 (5th Cir. 2001) (stating that when plaintiff failed to produce other sufficient evidence that the legitimate nondiscriminatory justification proffered by defendant was false, racially insensitive remarks made by principal/supervisor were to be treated as direct evidence of discrimination, and not as evidence of pretext necessary to rebut defendant's showing that their actions were justified), *with* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (holding conclusively that the Fifth Circuit has "unequivocally stated that it no longer adheres to its pretext-plus requirement in light of the Supreme Court's decision in *Reeves*," and thus the district court erred in instructing the jury that evidence of discrimination in addition to the combined evidence is required), *and* Evans v. City of Bishop, 238 F.3d 586, 591-92 (5th Cir. 2000) (opining that when plaintiff had adduced sufficient evidence that defendant's proffered nondiscriminatory justification is pretextual, evidence of derogatory but unrelated remarks produced above and beyond the combined evidence case were not required to be in "direct context" and were properly considered by the jury).

122. *See* Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400-01 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001) (holding that despite the Supreme Court's *Reeves* decision regarding the burden of proof required at the pretext phase, evidence that plaintiff was hindered in his attempts to join department committees by not being named to them was not evidence of pretext, faulty evaluations were not sufficient evidence of pretext, and anti-semitic remarks by a member of a promotions and pay raise committee were not sufficient to raise an inference of discrimination). *But see Evans*, 238 F.3d at 591-92 (stating that when a superior official made racial comments directed at African Americans, the jury should be allowed to take such comments into account even though they are not necessarily in "direct context" since any evidence that can help in ascertaining the defendant's actual motivations must be considered).

123. *See* Brown v. CSC Logic, Inc., 82 F.3d 651, 657 (5th Cir. 1996) (explaining that insufficient evidence of pretext was shown when plaintiff, after establishing a prima facie case, produced evidence to rebut defendant's proffered nondiscriminatory justification that the layoffs were due to economic reasons, showing that (1) appellants were the only ones laid off; (2) the number of workers increased after appellants' firing; (3) appellants were not in departments with overstaffing issues; (4) defendant later gave raises and bonuses; (5) appellants' work load and duties were unaffected with the loss of a major client; and (6) appellant had created, prior to termination, a budget showing profits higher than required); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 591-92 (2001) (stating that the unifying rationale of *Reeves* is that all evidence produced in the record as a result of following the *McDonnell Douglas* procedures should be considered, and not just that contained in the combined evidence, and including what was previously considered peripheral evidence such as stray remarks).

and one where it is merely shown that the defendant was negligent in the handling of a personnel matter.[124] Regardless, the strength the evidence contained in the plaintiff's prima facie case plus the evidence of pretext offered to rebut the employer's nondiscriminatory justification drives what, if any, additional evidence might be required by the court.[125]

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124. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2308-09 (1995) (explaining the difference in evidentiary burdens in cases where defendants are openly deceptive versus cases involving less overt discrimination).

125. *See* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 224-25 (5th Cir. 2000) (holding that plaintiff successfully rebutted defendant's nondiscriminatory justification by offering evidence showing that she had (1) received a favorable evaluation; (2) was not provided with any formal evaluations, written or otherwise; (3) was hastily fired after a harassing co-worker with influence in the company insisted she be fired and threatened to quit himself if she was not; (4) done a exemplary job of record keeping that some employees complained of; and (5) some witnesses testifying against her were not disinterested); *id.* at 226 (opining further that additional evidence of stray remarks was appropriate additional evidence since the perpetrator was responsible for plaintiff's termination and the remarks were age based, and finding so even though speaker of the remarks had only influence over plaintiff's firing, and not direct authority); Vadie v. Miss. State Univ., 218 F.3d 365, 368-73 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001) (stating that plaintiff offered "absolutely no evidence of national origin discrimination" when the record reflected evidence showing that (1) plaintiff had been a tenured professor in another department at the university; (2) the faculty in the department to which plaintiff applied "recommended" him for the position; (3) the department head personally sought out faculty members "recommending" Vadie to ascertain their support, and in response to which no faculty voiced support; (4) at least one applicant eventually hired for a vacant position over Vadie had admittedly lesser qualifications and was American, and another position was filled with a Hispanic applicant; and (5) a change in qualification requirements for positions Vadie was applying for that specifically excluded only Vadie's application); Bauer v. Albemarle Corp., 169 F.3d 962, 967 (5th Cir. 1999) (stating that after plaintiff's prima facie case was successfully rebutted by defendant, plaintiff "must *prove* that Albemarle's stated reason was pretextual *and* that the real reason for her discharge was either her gender or her age") (emphasis added); Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997) (holding that where plaintiff had presented a prima facie case, evidence showing that (1) supervisor had made age based remarks; (2) that after the supervisor took over most new hires were young; and (3) disparate treatment, offered to rebut defendant's claim, was "little more than Price's subjective belief" and insufficient to preclude judgment as a matter of law); Ray v. Tandem Computers, Inc., 63 F.3d 429, 434-35 (5th Cir. 1995) (holding that plaintiff's evidence of (1) transfer of a lucrative sales account to a male co-worker and reassignment of a poor account to plaintiff who is female; (2) scheduling of lunch meetings at a local "Hooters" restaurant; (3) an alleged statement four years before the adverse employment action that defendant was planning to fire "the cunt in the office"; (4) supervisor's statements that a co-worker was the "better man for the job"; and (5) defendant's denial initially of a commissions reservation, failed to rebut defendant's proffered justification for termination based on performance related factors).

C. *Fifth Circuit Position After* Burdine

After *Burdine* was decided in 1981, summary judgment cases regarding employment discrimination were relatively rare in the Fifth Circuit.[126] Thus, the first post-*Burdine* decisions rendered by the court usually involved reviews of final judgments, and to a more limited extent, cases where the district court granted defendants' motions for judgment notwithstanding the verdict ("JNOV").[127] Much of this had to do with the aforementioned statutory changes to the Civil Rights Act, as well as the Supreme Court's modifications to summary judgment standards.[128]

In the twelve years that separated *Burdine* and *Hicks*, the Fifth Circuit's treatment of proof requirements in employment discrimination was all over the proverbial map.[129] Initially, it appeared that the court would

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126. *Cf.* Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1131, 1147 (5th Cir. 1981) (affirming the final judgment of the district court for the plaintiff); Jackson v. Sears, Roebuck & Co., 648 F.2d 225 (5th Cir. 1981) (affirming the judgment of the lower court for the defendant on a claim brought under the ADEA); Brown v. A.J. Gerrard Mfg. Co., 643 F.2d 273, 274-76 (5th Cir. 1981) (reversing a final judgment of the district court for the defendant).

127. *See* Sylvester v. Callon Energy Servs., Inc., 724 F.2d 1210, 1216 (5th Cir. 1984) (vacating the judgment of the district court for the employer and remanding for the purpose of additional fact finding on the issue of pretext); Elliott v. Group Med. & Surgical Serv., 714 F.2d 556, 566 (5th Cir. 1983) (reversing judgment of the district court upon a jury finding for the plaintiff when plaintiff established only that they were in a protected age group, were qualified for the positions, were terminated, and were replaced with younger employees); *Gerrard*, 643 F.2d at 276 (reversing a lower court judgment in favor of the defendant, articulating the appropriate burden of proof standard in employment discrimination cases to be those promulgated in *McDonnell Douglas* and *Burdine*, and clearly adopting the principal holding in *Burdine* that the defendant's burden within the *McDonnell Douglas* framework is one of production only, and does not require the defendant to persuade the trier of fact that the adverse action was nondiscriminatory).

128. *See* 42 U.S.C. § 1981a(a)(1)(c) (2001) (stating that intentional discrimination cases can be tried before juries while cases involving disparate impact cannot); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (stating that "[i]n the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'") (emphasis in original); John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* 4 LAB. LAW. 747, 763 (1988) (explaining that in light of *Matsushita* and *Celotex*, movants are no longer saddled with the evidentiary burden of proof); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 228-29 (1993) (asserting that the loosening of summary judgment standards by the Supreme Court has prompted federal courts to affirm district court summary judgment orders).

129. *Compare* Moore v. Eli Lilly & Co., 990 F.2d 812, 816-17 (5th Cir. 1993) (quoting *Bienkowski v. Am. Airlines*, 851 F.2d 1503, 1508 (5th Cir. 1988) as supporting the proposition that the plaintiff must do more than merely prove that the defendant's proffered nondiscriminatory justification is false, for "[t]here must be some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimina-

adhere to a more restrictive "judgment for defendant required" position, holding in *Reeves v. General Foods Corp.*[130] that the combined evidence, without additional evidence of discrimination, would not support a judgment for the plaintiff.[131] It was not long, however, until some Fifth Circuit cases deviated from that position.

In *Thornbrough v. Columbus & Greenville Railroad*,[132] for example, the court recognized that the Supreme Court's decision in *United States Postal Service Board of Governors v. Aikens*[133] superseded the earlier decision in *Reeves*.[134] *Thornbrough* went as far as suggesting a view similar to that espoused in Justice Blackmun's concurrence in *Aikens*, which had suggested a plaintiff should always prevail on the basis of combined evi-

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tion because of age to one ensuring dismissals only for just cause to all people over 40"), *and* Waggoner v. City of Garland, 987 F.2d 1160, 1165-66 (5th Cir. 1993) (determining that plaintiff cannot refute employer's proffered nondiscriminatory justification for the adverse employment action, that plaintiff was fired for committing sexual harassment, by proving the charge to be untrue; plaintiff must instead prove that employer did not actually believe the allegation against the plaintiff in order to show that the justification was pretextual), *and id.* (stating that plaintiff must demonstrate that defendants "did not in good faith believe the allegations, but relied on them in a bad faith pretext to discriminate against him *on the basis of his age")*, *and* Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1508 (5th Cir. 1988) (determining that in order to prove intentional discrimination, plaintiff cannot simply prove that employer's assessment of his performance is false; plaintiff must provide direct evidence of discrimination, data regarding co-workers in the same department, evidence of treatment by employer of other employees, or employer's failure to follow standard policies and practices), *with* Walther v. Lone Star Gas Co., 952 F.2d 119, 123 (5th Cir. 1992) (stating that "[a] plaintiff may demonstrate pretext either by showing that a discriminatory motive more likely motivated the employer or that the employer's explanation is unworthy of credence"), *and id.* (opining that "[w]e have recognized that motivation and intent in employment discrimination cases can often be proved only through circumstantial evidence"), *and* Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985) (stating that plaintiff is not required to prove that defendant was motivated by discriminatory animus; defendant must merely convince the trier of fact that the proffered nondiscriminatory justifications were false), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), *and id.* (stating conclusively that if the plaintiff can prove that employees not terminated were not as qualified as plaintiff, the factfinder "is entitled to conclude that the Railroad's articulated reasons are pretexts"). "Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it was a mistake at all." *Id.*

130. 682 F.2d 515 (5th Cir. 1982).

131. Reeves v. Gen. Foods Corp., 682 F.2d 515, 523 (5th Cir. 1982); *Thornbrough*, 760 F.2d at 640 n.7 (citing *Reeves v. Gen. Foods Corp.*, 682 F.2d 515 (5th Cir. 1982) for the proposition that plaintiff must not only rebut employer's justification, but also provide direct evidence that he was discriminated against because of age), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

132. 760 F.2d 633 (5th Cir. 1985).

133. 460 U.S. 711 (1983).

134. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 640 n.7 (5th Cir. 1985), *abrogated by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

dence.[135] This, as contrasted with *Reeves*, looks much like the "judgment for plaintiff always permitted position" outlined above.[136]

But, the Fifth Circuit, likely in response to dramatic changes in summary judgment standards and the passage of the Civil Rights Act of 1991, retreated to more restrictive standards.[137] In *Bienkowski v. American Airlines*,[138] for example, the court clearly utilized the "judgment for the defendant required position," and opined that in addition to the combined evidence, direct evidence of discrimination is required in order for a plaintiff to prevail at summary judgment.[139] This standard would become prevalent in later *Burdine*-era decisions, and beyond.[140]

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135. *Id.*; *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 718 (1983) (Blackmun, J., concurring) (stating that "[t]he *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision"); Sylvester v. Callon Energy Servs., Inc., 724 F.2d 1210, 1213 (5th Cir. 1984) (stating that to prevail, the plaintiff Sylvester was only required to prove to the trier of fact that defendant's proffered reasons for the adverse action were pretextual).

136. *Sylvester*, 724 F.2d at 1213; s*ee also* Jones v. W. Geophysical Co. of Am., 669 F.2d 280, 284-85 (5th Cir. 1982) (determining that affidavits which controverted the employer's motive were sufficient to establish a prima facie under *McDonnell Douglas*, "permit[ted] an inference of discrimination," and should have prevented the district court from granting defendant's motion for summary judgment).

137. *See, e.g.*, Moore v. Eli Lilly & Co., 990 F.2d 812, 815-16 (5th Cir. 1993) (stating that the plaintiff cannot prevail on a mere showing that the defendant's proffered nondiscriminatory justification is not true; rather, plaintiff must provide some proof that discrimination actually motivated the defendant's actions); Waggoner v. City of Garland, 987 F.2d 1160, 1165-66 (5th Cir. 1993) (holding that plaintiff, in order to prove intentional discrimination, cannot simply produce evidence that the defendant's justification is wrong; plaintiff must show that defendants "did not in good faith believe the allegations, but relied on them in a bad faith pretext to discriminate against him *on the basis of his age*") (alteration in the original).

138. 851 F.2d 1503 (5th Cir. 1988).

139. Bienkowski v. Am. Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988); *see also id.* at 1508 n.6 (stating that the court disagrees with the decision of the Third Circuit in *Chippollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987), *abrogation recognized by* Seman v. Coplay Cement Co., 26 F.3d 428 (3d Cir. 1994) where that court established that a plaintiff *may* prevail upon a finding that the employer's proffered nondiscriminatory justification is false; there must be "some proof that age motivated the employer's action").

140. *See, e.g.,* Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999) (stating that once the defendant articulates a legitimate nondiscriminatory justification for the adverse employment action, the plaintiff must then show that the reason given was not the real one, and that discrimination was in order to avoid summary judgment); Lawrence v. Univ. of Tex. Med. Branch at Galveston, 163 F.3d 309, 312 (5th Cir. 1999) (stating that the plaintiff "must prove, by a preponderance of the evidence, both that the defendants' articulated reason is false *and* that the defendants intentionally discriminated") (emphasis added).

D. *Fifth Circuit Position After* Hicks

As previously mentioned, *Hicks* left uncertainty in its wake for courts and practitioners as to whether the combined evidence is sufficient to prove pretext.[141] Early post-*Hicks* cases in the Fifth Circuit continued to apply the "judgment for defendant required" standard to the combined evidence, thus requiring direct evidence of discrimination.[142] Some decisions, however, began to require increasingly significant levels of additional evidence beyond the combined evidence case in order to allow a plaintiff to survive summary judgment. In *Ray v. Tandem Computers*,[143] for example, the Fifth Circuit held that disparate treatment evidence, showing the employer assigned more lucrative sales accounts to a male counterpart, was insufficient proof of pretext.[144] Despite having taken

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141. *See* Sherie L. Coons, *Proving Disparate Treatment After* St. Mary's Honor Center v. Hicks*: is Anything Left of* McDonnell Douglas*?*, 19 J. CORP. L. 379, 412-13 (1994) (noting that inconsistencies in the *Hicks* opinion create a situation whereby plaintiffs in employment discrimination cases are required to prove that the defendant's proffered justification is a pretext for discrimination in order to prevail, yet the *McDonnell Douglas* framework that provides the proof structure whereby the plaintiff can reach the pretext stage in the first place allegedly drops out upon the defendant's proffering of a justification); Louis M. Rappaport, St. Mary's Honor Center v. Hicks*: Has the Supreme Court Turned Its Back on Title VII by Rejecting "Pretext Only?,"* 39 VILL. L. REV. 123, 157 (1994) (discussing the fact that the *Hicks* opinion changes the *McDonnell Douglas* framework's approach, and adopts a hybrid that is not entirely pretext plus but places a heavier burden on the plaintiff attempting to prove a discrimination case in contradiction to other Supreme Court precedent).

142. *See* Armstrong v. City of Dallas, 997 F.2d 62, 65 n.6 (5th Cir. 1993) (stating that "[h]ence, the employee does not necessarily prevail by producing some evidence of discrimination and disproving the employer's proffered explanation"). "Rather, the employee *may prevail*, and indeed will prevail, upon persuading the trier-of-fact of the ultimate issue—intentional discrimination." *Id.* (emphasis in original) (citations omitted); *see also* Ray v. Tandem Computers, Inc., 63 F.3d 429, 434-36 (5th Cir. 1995) (holding that although plaintiff had circumstantial evidence of discrimination, including discriminatory remarks, plaintiff failed to prove that defendant's articulated justification was pretextual).

143. 63 F.3d 429 (5th Cir. 1995)

144. *Ray*, 63 F.3d at 434; *see also* Brown v. CSC Logic, Inc., 82 F.3d 651, 657 (5th Cir. 1996) (holding as insufficient additional evidence of discrimination, when employer's asserted justification was economic restructuring, plaintiffs proffered evidence that (1) they were only employees laid off in the month of June; (2) total number of employees increased after their layoff; (3) plaintiffs did not work in departments that were overstaffed; (4) younger employees were hired after their termination; (5) loss of a major client did not affect plaintiffs' duties; and (6) plaintiff had presented a budget prior to his termination that called for a profit margin higher than that required by the home office); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 149 (5th Cir. 1995) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) for the proposition that once an employer meets its burden of coming forth with a nondiscriminatory justification for the adverse action, the presumption of discrimination created by the plaintiff's case disappears, and plaintiff must "prove by a preponderance of the evidence that the employer's articulated reason is but a pretext for

this position, the Fifth Circuit appeared to move to a less stringent requirement by 1996. In that year the court stated in *Rhodes v. Guiberson Oil Tools*,[145] a significant en banc decision, that they had "held repeatedly that a plaintiff need not provide direct evidence to sustain a jury finding of discrimination."[146] However, given the approach taken in several of the cases decided prior to *Rhodes*, such as *Ray v. Tandem Computers* and similar cases already discussed, this statement is open to debate. Many pre-*Rhodes* decisions seem to implicitly require evidence beyond that which might allow a jury to infer discrimination in the context of the combined evidence case.[147]

In *Rhodes*, the employer terminated a fifty-six year-old salesman with thirty-one years of service, allegedly as part of a reduction in the workforce during an economic downturn.[148] The Fifth Circuit heard *Rhodes* en banc to rule on the sufficiency of evidence issue in light of *Hicks*,

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discrimination," but further citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) for the proposition that a plaintiff must prove that discrimination was in fact what influenced the employer in his decision making process); *id.* at 153 (noting that *Hazen Paper Co. v. Biggins* does not allow use of employer interference with employee retirement benefits as evidence to support a cause of action under the ADEA without evidence that the decision of the employer was based on age related animus). *But see Hazen Paper*, 507 U.S. at 613 (indicating clearly that the Court does not foreclose a situation where a defendant might have liability under both ERISA and ADEA if the employer fires the employee and was motivated by age related animus as well as the age of the employee; the Court only holds that a defendant does not commit a violation of the ADEA simply by committing spurious acts regarding the retirement related benefits of an older employee vested because of his or her length of service with the employer).

145. 75 F.3d 989 (5th Cir. 1996).

146. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *see also* Burns v. Tex. City Refining, Inc., 890 F.2d 747, 751 (5th Cir. 1989) (noting also that direct evidence is generally not required in order to allow a finding by the jury that discrimination in fact exists).

147. *See, e.g.*, Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 814 (5th Cir. 1991) (commenting that while the court is not to decide at the summary judgment phase of a case the issue of who is best qualified for a job in a discrimination context, the plaintiff might prove that the defendant's proffered nondiscriminatory justification was pretextual upon a showing that he or she was clearly better qualified; a showing that plaintiff is well qualified will not suffice as evidence of pretext); Bienkowski v. Am. Airlines, 851 F.2d 1503, 1507-08 (5th Cir. 1988) (stating that "[e]ven if the trier of fact chose to believe an employee's assessment of his performance rather than the employer's, that choice alone would not lead to a conclusion that the employer's version is a pretext for age discrimination"). "More is required, such as 'direct' evidence of age discrimination . . . ." *Id.*; *see also* Reeves v. Gen. Foods Corp., 682 F.2d 515, 523 (5th Cir. 1982) (holding that the evidence supporting the prima facie case cannot be used to support the plaintiff's burden of proof regarding pretext, and the plaintiff was then required to "introduce substantial evidence to show that General Foods' articulated reasons were pretextual *and* that he had been discriminated against *because of age*") (emphasis added).

148. *Rhodes*, 75 F.3d at 992.

which had just been decided by the Supreme Court.[149] The *Rhodes* court clearly stated a two-part test for determining whether a jury issue was present.[150] First, the evidence must create an issue of fact as to whether the employer's proffered reasons actually motivated him.[151] Second, there must be a realistic inference that age was a deciding factor in the employer's actions.[152] In explaining what was meant by "evidence necessary to support an inference of discrimination," the *Rhodes* court appears to articulate a "judgment for plaintiff sometimes permitted position" with respect to the combined evidence case (the plaintiff's prima facie case plus evidence used to show that the defendant's explanation is unworthy of credence) and its ability to preclude summary judgment for the defendant.[153] The court begins its analysis by stating that a jury can infer discrimination from substantial evidence that the employer's justification is false.[154] While this does not appear to be the stringent "judgment for

149. *Id.*

150. *Id.* at 994. The court, after stating that a combined evidence case will usually allow the trier of fact to find discrimination without additional evidence, states the following standard for determining whether the evidence is sufficient to support a ruling for the plaintiff:

> [t]hus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Id.

151. *Id.*

152. *Rhodes*, 75 F.3d at 994; *see also* Wyvill v. United Companies Life Ins. Co., 212 F.3d 296, 301 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (finding *Rhodes* as the governing standard for determining summary judgment, as well as for determining whether the evidence taken from the record as a whole is sufficient to preclude summary judgment).

153. *See Rhodes*, 75 F.3d at 994 (expressing that although there must be a reasonable inference of discrimination that can be drawn from the circumstantial evidence, the evidence that allows a rejection of the defendant's proffered justification "will often, perhaps usually, permit a finding of discrimination without additional evidence").

154. *Id.* After stating the standard applied to summary judgment cases, the court provides direction with regard to the level of evidence sufficient to support an inference of discrimination:

> [T]he evidence necessary to support an inference of discrimination will vary from case to case. A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false. The evidence may, for example, strongly indicate that the employer has introduced fabricated justifications for an employee's discharge, and not otherwise suggest a credible nondiscriminatory explanation.

defendant required" position, the court goes on to clarify its position by stating that if the evidence proffered by the defendant is not substantial, a jury cannot infer discrimination.[155] Therefore, while less adverse to plaintiffs than prior decisions, *Rhodes* placed some parameters on the amorphous circumstantial evidence of pretext and *Reeves* supersedes it only to the extent that it is inconsistent with that decision.[156]

Id.

155. *See id.* (stating "[b]y contrast, if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent"). *But see* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (noting that the City of Gainesville relied on *Rhodes* to support its proposition that the correct standard in the Fifth Circuit is "pretext plus," and therefore the lower court was not in error in refusing to give a "permissive pretext" instruction); *id.* (noting that although the court found *Rhodes* to be consistent with the Supreme Court's standards pronounced in *Reeves* in *Vadie v. Miss. State Univ.*, 256 F.3d 355 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001), that in itself does not mean that the Fifth Circuit continues to follow a "pretext plus" standard in light of *Reeves* and expressly states that the Fifth Circuit no longer follows such as standard in light of its decision in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000)). In explaining the possible interpretation of *Rhodes* as purporting to advocate a pretext plus point of view, the court cites portions of *Rhodes* that lend credence to the city's "pretext plus" argument. For example, *Rhodes* states:

> [I]f the evidence put forth by the plaintiff to establish the prima facie case *and* to rebut the employer's reason is not substantial, a jury cannot reasonably infer discriminatory intent . . . . When a plaintiff has offered pretextual evidence that allows a factfinder to reject the defendant's proffered reasons *and* infer discrimination, other circuits have been unwilling to upset a jury verdict for the plaintiff.

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (emphasis added) (citations omitted), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

156. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000) (citing *Rhodes* as being a case indicative of the "pretext plus" standard for determining employment discrimination cases); *Russell*, 235 F.3d at 223 n.4. The court states in a footnote that the Supreme Court in *Reeves* puts the decision in *Rhodes* into the category of "pretext" plus, although all the Court really does is include the cases in a comparison cite with other "permissive pretext" cases. *Id.* Nonetheless, the *Russell* court explicitly repudiates "pretext plus":

> While portions of our *Rhodes* opinion do not fully comport with *Reeves*, we have previously recognized that there are central features of *Rhodes* that endure . . . . We do not see much to be gained from dissecting *Rhodes* to divine those features. Rather, we simply comply with the Supreme Court's mandate in *Reeves* not to substitute our judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination. We therefore underscore that *Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases. *Reeves* guides our decisions, and insofar as *Rhodes* is inconsistent with *Reeves*, we follow *Reeves*.

Id. (citation omitted).

All good things must come to an end, and only four short months later, in *Brown v. CSC Logic, Inc.*,[157] the court again retreated to the depths of "pretext plus."[158] In *Brown*, the Fifth Circuit rejected seemingly solid evidence that the employer's justification was questionable, and avoided the *Rhodes* standard by adopting a completely new but related rule known as the *Proud* presumption.[159] This presumption states that if the individual who is accused of a discriminatory act is the same individual who hired the complaining employee in the first place, a presumption exists that discrimination was not the employer's motive.[160] Whatever the value of such a presumption, the *Brown* court was clearly able to avoid applying a looser pretext standard that had just been promulgated in *Rhodes*.[161]

This legal analysis continued in a series of cases that led up to the Supreme Court's rejection of the "judgment for defendant required" position, also known in some circles as "pretext plus."[162] The decision in

157. 82 F.3d 651 (5th Cir. 1996).

158. *See* Brown v. CSC Logic, Inc., 82 F.3d 651, 657-58 (5th Cir. 1996) (holding that although plaintiff did provide circumstantial evidence of discrimination, the facts presented in the case of the plaintiff here were not "sufficiently egregious" to rebut what the court describes as an inference that defendant's justification was not pretextual vis-a-vis age discrimination).

159. *See Brown*, 82 F.3d at 658 (indicating that the inference against discrimination created by the fact that the person firing the employee and the person who hired him are one in the same has been adopted in other jurisdictions, and is now expressly approved of by the Fifth Circuit).

160. *See* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (stating that when the person hiring and firing are one in the same individual, and termination takes place a short period of time after the plaintiff is hired, there will exist a "strong inference" that the adverse employment action taken by the defendant was not the result of discrimination, but rather was the cause of some other factor); *id.* at 798 (admitting that there are situations where a firing by the same supervisor who hired could still be proven in court to be discriminatory, but that when poor evidence of discrimination exists "it is likely that the compelling nature of the inference arising from facts such as these will make cases involving this situation amenable to resolution at an early stage").

161. *See Brown*, 82 F.3d at 658 n.25 (explaining that the outcome of the court's decision in *Brown* is not impacted by the *en banc* decision in *Rhodes* since there is a *Proud* presumption in place, and the evidence offered by the plaintiff was not adequate to rebut the strong inference of nondiscrimination created by such a presumption, thus making an examination of the evidence in light of *Rhodes* unnecessary); *id.* at 658 n.22 (citing *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) for its rationale that, seemingly and perhaps conveniently, zebras can never change their stripes because "[f]rom the standpoint of the putative discriminator, '[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job'").

162. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000) (stating that the Fifth Circuit in its decision in the *Reeves* case "proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of

Chaffin v. John H. Carter Co.,[163] exemplifies the pre-*Reeves* position in the Fifth Circuit, where the court held quite clearly that in order to defeat summary judgment, a plaintiff must produce direct evidence of discrimination.[164] Proof of pre-text will not, according to *Chaffin*, ever suffice.[165]

E. *Fifth Circuit Application of* Reeves

The Supreme Court clearly rejected the aforementioned "judgment for plaintiff required" position.[166] After *Reeves*, it is clear that the combined evidence, consisting of a prima facie case and sufficient evidence that the employer's proffered justification is false, can defeat summary judgment

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fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination" and that *Hicks* explicitly states that the combined evidence case may allow a finding of discrimination); *see also* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (stating that the court no longer follows a pretext plus standard in light of the Supreme Court' decision in *Reeves*); Evans v. City of Bishop, 238 F.3d 586, 588, 590 (5th Cir. 2000) (lamenting that although a Fifth Circuit panel had previously found for the defendant in an unpublished opinion affirming the decision of the district court and after withdrawing that opinion, finding that the plaintiff's combined evidence case presented sufficient evidence to allow the case to go to trial in light of *Reeves*); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 223 n.4 (5th Cir. 2000) (stating in a footnote that *Reeves* is the "authoritative statement" regarding the pretext burden, and that to the extent that *Rhodes* might be inconsistent with *Reeves*, the Supreme Court's standard governs).

163. 179 F.3d 316 (5th Cir. 1999).

164. *See* Chaffin v. John H. Carter Co., 179 F.3d 316, 320 (5th Cir. 1999) (stating that in order for a plaintiff to defeat a defendant's motion for summary judgment, he must not only provide substantial evidence that the justification proffered by the defendant is not true, but must also offer evidence that discrimination was the real reason for the adverse employment action).

165. *See id.* (stating explicitly that the employee will not prevail at summary judgment by only making a showing that the defendant's justification is a pretext for discrimination; the plaintiff must show both that the justification provided is not true, and that the true reason for the adverse action is discrimination); *see also* Walton v. Bisco Indus. Inc., 119 F.3d 368, 370 (5th Cir. 1997) (stating that plaintiffs must prove both that discrimination drove the employer's decision vis-a-vis the adverse employment action, and that the reasons offered as justification are false).

166. *Reeves*, 530 U.S. at 148 (concluding explicitly that "the prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (stating that the argument that a combined evidence case compels a finding for the plaintiff is incorrect; rather, rejection of the defendant's justifications for the adverse employment action will "*permit*" the fact finder to make an inference as to whether the defendant unlawfully discriminated against the employee); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (holding that a plaintiff may succeed in his or her evidentiary burden either by convincing the trier of fact that discrimination is likely to have motivated the defendant, or more indirectly by making a showing that the legitimate nondiscriminatory justification offered by the defendant is not worthy of credence).

in appropriate cases.[167] The Supreme Court clearly states so in its primary holding.[168] What remains unclear, however, is how much evidence constitutes sufficient evidence, how strong the combined evidence must be to defeat a motion for summary judgment on its own, and how much additional evidence will suffice when a plaintiff is faced with weak combined evidence.[169]

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167. *See* Kim J. Askew, Reeves v. Sanderson Plumbing Products, Inc. *(Is Pretext-Plus Really Gone?)*, VPB0919 A.L.I.-A.B.A. 457, 467 (2000) (noting that the Supreme Court in *Reeves* admonished the Fifth Circuit for "misconceiving" the burden placed upon the plaintiff in a discrimination case by limiting its review of the plaintiff's evidence such that the combined evidence case was legally insufficient to sustain a finding for the plaintiff by the jury); David L. Gregory, *The Supreme Court's Labor and Employment Law Jurisprudence, 1999-2001*, 36 TULSA L.J. 515, 524-25 (2001) (summarizing the *Reeves* holding, and explaining that the Supreme Court determined that the combined evidence case could support a finding for the plaintiff without the plaintiff being required to produce additional evidence that the employer discriminated against him to survive summary judgment); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 587-88 (2001) (explaining that the "pre-text plus" arm of the Supreme Court in *Hicks* interpreted and extended language which stated that the presumption of discrimination created by the prima facie case "drops out of the picture" upon the defendant's justifying its actions, requiring the plaintiff to produce sufficient evidence of discrimination, but that O'Connor in *Reeves* rejected this proposition by stating that the trier of fact can in fact consider the prima facie evidence, and all the inferences that can be drawn from it); *Age Discrimination: Past, Present, and Prologue*, TRIAL, Dec. 2000, at 54 (stating that in rejecting the trial court's verdict below for the plaintiff, the Supreme Court in *Reeves* rejected the "pretext plus" standard, and held alternatively that proof that the justification offered by the defendant can, in combination with the prima facie case, be sufficient to preclude judgment for the defendant).

168. *Reeves*, 530 U.S. at 149. The Court, in addition to stating its principal holding that the combined evidence case can allow judgment for the plaintiff, also provides some context to its holding by stating:

> [f]or purposes of this case, we need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Id. at 149.

169. *See id.* at 148 (noting that although the combined evidence case can allow the trier of fact to find for the plaintiff, "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory"); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 591-92 (2001) (explaining that *Reeves* did not focus on the Fifth Circuit's "slicing and dicing" approach to reviewing the record of the case when ruling on summary judgment motions, and further noting that the early cases since *Reeves* indicate that many lower courts have not significantly changed their approach to evidentiary issues in summary judgment cases as a result of the *Reeves* decision).

Although the application of *Reeves* by the Fifth Circuit is relatively inconsistent, recent opinions have shown signs of clearer direction.[170] On one hand, the Fifth Circuit has held, even in light of *Reeves*, that when the plaintiff demonstrates pretext, discrimination suits still require the plaintiff to provide evidence of discrimination sufficient to survive summary judgment.[171] Interestingly, the Fifth Circuit, post-*Reeves*, has also sought to retreat to the cover of its kinder pretext standards espoused in *Rhodes* and its progeny.[172] In *Vadie v. Mississippi State University*,[173] the Court states in a footnote the belief that *Reeves* did not change the law in the Fifth Circuit, and that its "panel opinion in that case was simply inconsistent with our *en banc* decision in *Rhodes v. Guiberson Oil Tools*."[174] This

170. *See, e.g.*, Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (stating that the Fifth Circuit has adopted as its standard the holding stated in *Reeves*, and that to the extent that prior precedent conflicts with *Reeves*, *Reeves* is to be followed); Pratt v. City of Houston, 247 F.3d 601, 606-07 (5th Cir. 2001) (stating the two part test laid out in *Rhodes* for determining whether summary judgment is applicable, and further noting that the standard set forth in *Reeves* applies in determining whether rational trier of fact could find that the plaintiffs were discriminated against on the basis of race); Blow v. City of San Antonio, 236 F.3d 293, 297-98 (5th Cir. 2001) (holding that *Reeves* is controlling, and further noting that the case at bar presented a direct application of *Reeves* in that the plaintiff satisfied the burden of making out a prima facie case, and then rebutted the defendant's explanation by presenting evidence to create fact issues regarding the genuineness of the explanations proffered by the defendant).

171. *See* Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 403 n.3 (5th Cir. 2001) (noting that in order for a plaintiff to carry his burden under the *Reeves* standard, the plaintiff is required to present substantial evidence of pretext, as required in *Bauer v. Albemarle Corp.*, 169 F.3d 962 (5th Cir. 1999) which was not, according to the *Auguster* court, abrogated in any way by *Reeves*); Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001) (noting that in a case where the plaintiff had admittedly provided some evidence of pretext and discriminatory remarks made by superiors, and keeping in mind "the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext," evidence of discrimination is still necessary to prevail in discrimination suits at the summary judgment phase).

172. *See Pratt*, 247 F.3d at 606-07 (quoting *Vadie v. Miss. State Univ.*, 218 F.3d 365, 373 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001) which states, "We have said that summary judgment is inappropriate 'if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which plaintiff complains'"); *Vadie*, 218 F.3d at 373 n.23 (stating that in the opinion of the court, the Supreme Court's decision in *Reeves* was not inconsistent with the *en banc* decision in *Rhodes*).

173. 218 F.3d 365 (5th Cir. 2000).

174. Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.23, *cert. denied*, 531 U.S. 1113 (2001) (citations omitted). The court states in *Vadie*:

> [w]e have considered the application of the Supreme Court's recent decision in *Reeves v. Sanderson Plumbing Prods., Inc.* and find that it does not affect the law applicable to this case. Our study of *Reeves* convinces us that our panel opinion in that case was

is a correct statement if the Fifth Circuit's decision in *Reeves* was the *only* deviation from *Rhodes*, but as this analysis has indicated, that is far from the case.[175] Thus, these first post-*Reeves* cases apparently show a reluctance on the part of the Fifth Circuit to completely abandon its pretext-plus standard.[176]

Conversely, the court has more recently applied the more forgiving *Reeves* standard in cases like *Blow v. City of San Antonio*,[177] finding that evidence of the falsity of the employer's nondiscriminatory justification can be probative of discrimination, and sufficient to avoid summary judgment.[178] Put another way, the Fifth Circuit seems to have come around to the *Reeves* interpretation; the evidence supporting the prima facie case, in combination with the "sufficient evidence" showing that the reasons given by the employer as justification for its actions are false, can in fact preclude summary judgment.[179] The most recent Fifth Circuit pronouncements on the issue follow *Blow*, and may be an indication that the Fifth Circuit is softening its position on the issue.[180] The *Reeves* standard was also used in a recent same-sex harassment case, and does not deviate from the *Reeves* interpretation.[181]

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simply inconsistent with our en banc decision in *Rhodes v. Guiberson Oil Tools* . . ., and that the Supreme Court, in deciding *Reeves*, plainly affirmed that en banc precedent.

Id.

175. *See generally* Bienkowski v. Am. Airlines, 851 F.2d 1503, 1507-08 (5th Cir. 1988) (stating that in order to prevail at summary judgment, plaintiff cannot merely show that the employer's judgment of his performance was erroneous; plaintiff must show directly that age discrimination was the root source of the alleged pretext).

176. *See, e.g.*, Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 403 (5th Cir. 2001) (noting that the plaintiff is required to produce "substantial evidence" in order to meet his pretext burden, and further noting that *Reeves* does not overrule prior precedent dictating the substantial evidence requirement even though *Reeves* itself requires only "sufficient evidence"); Reeves v. Gen. Foods Corp., 682 F.2d 515, 523 (5th Cir. 1982) (holding that the evidence supporting the prima facie case cannot be used to support the plaintiff's burden of proof regarding pretext, and plaintiff was then required to "introduce substantial evidence to show that General Foods' articulated reasons were pretextual and that he had been discriminated against *because of age*") (emphasis in original).

177. 236 F.3d 293 (5th Cir. 2001).

178. Blow v. City of San Antonio, 236 F.3d 293, 297-98 (5th Cir. 2001).

179. *Id.*

180. *See* Ratliff v. City of Gainesville, 256 F.3d 355, 362 (5th Cir. 2001) (stating conclusively that pretext plus is no longer the standard in the Fifth Circuit, while *Reeves* is the correct standard); *Blow*, 236 F.3d at 297 (holding that the district court was inconsistent with the *Reeves* standard when summary judgment was granted for the defendant in light of evidence creating an inference of discrimination sufficient to avoid summary judgment).

181. *See* Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 519-20 (5th Cir. 2001) (stating that "[i]f the plaintiff presents evidence supporting the prima facie case, plus

Today, without further precedent, it is still difficult to determine what standards the Fifth Circuit will apply in application of *Reeves* as its stated summary judgment standard.[182] Although the court has stated rather explicitly that it will follow *Reeves*, the Supreme Court's adoption of a permissive, rather than mandatory finding for the plaintiff upon proof that the defendant's justification is false, gives courts significant leeway with respect to how much evidence they will require.[183] As one commentator recently stated, this allows courts to "slice and dice" the plaintiff's evidence, and in essence formulate an outcome they believe to be the correct one without giving the case to the jury.[184]

Given that *Reeves* will evidently become the dominant standard in the Fifth Circuit, the issue that will continue to haunt practitioners is that of determining how much evidence should be required to preclude summary judgment at the pretext phase.[185] While many hailed *Reeves* as a dra-

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evidence that the reasons given by the employer for the adverse employment action were pretextual, a jury may infer the existence of retaliation").

182. *See* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592-93 (2001) (noting that the first two decisions promulgated by the Fifth Circuit following *Reeves* sought to minimize the impact of the decision, while the more recent decisions seem to adopt it).

183. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000). The Court limits the reach of a successful combined evidence case in stating the following:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id.

184. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 591-92 (2001) (stating that the trier of fact is to consider all evidence produced under the *McDonnell Douglas* burden shifting framework, and detesting the idea that the plaintiff's evidence be dismissed before any test for summary judgment or judgment as a matter of law is applied). The biggest lesson from *Reeves* is that the trier of fact should consider all probative evidence contained in the case record prior to making decisions regarding summary judgment or judgment as a matter of law. *Id.*

185. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2305 (1995) (noting that in the *Hicks* era as well, after the employer meets its burden of producing a legitimate justification for the adverse employment action, the only remaining issue is whether the plaintiff can prove by a preponderance of the evidence that the defendant acted discriminatorily). "The closely related question is whether the evidence of discrimination is sufficient to permit a reasonable factfinder to reach a pro-plaintiff verdict." *Id.*; *see also* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 600-01 (2001) (noting that since *Reeves*,

matic change in the fortunes of plaintiffs at summary judgment, the reality is that the central holding in *Reeves* changed very little.[186] While the plaintiff now clearly has at his disposal the totality of the evidence contained in the combined evidence case to support an inference of discrimination, there must still be "sufficient evidence" of pretext.[187] This, in combination with *Reeves*'s qualifying language quoted earlier, tells practitioners quite clearly that not all combined evidence cases will be strong enough to survive the summary judgment ax.[188] This puts the *Reeves* standard under the umbrella of the "judgment for plaintiff sometimes permitted" category, and in fact, this has borne itself out in the most recent Fifth Circuit opinions.[189]

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many courts have refrained from fully implementing the liberalized standards for plaintiffs in the sense that many will not recognize that the totality of the evidence under *Reeves* counts).

186. *See* Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 747 (2001) (noting that the clarification and unity that was to come from the Supreme Court's decision in *Reeves* has not in fact come to pass, as many lower courts remain uncertain about the amount of evidence and the proof required to negate a motion for summary judgment).

187. *Reeves*, 530 U.S. at 143 (explaining the pretext phase of the burden shifting framework and stating that "although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual'") (citations omitted). The Court states that the prima facie case in combination with sufficient evidence to allow a finding that the justification given by the employer is false may allow a trier of fact to come to the conclusion that discrimination was the true motive of the employer. *Id.* at 148.

188. *See Reeves*, 530 U.S. at 148-49 (stating that a combined evidence case will not in all cases allow a finding for the plaintiff). In discussing whether summary judgment is proper, the court considers the robustness of the prima facie case, the probative value of evidence disproving the defendant's proffered justifications, and "any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law"). *See also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (rejecting the argument that plaintiff's successful proof of the prima facie case and evidence that the proffered reasons put forth by the defendant are false will compel judgment for the plaintiff in all cases; such a showing will merely "*permit*" the court to enter such a judgment).

189. *See, e.g.*, Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 402-03 (5th Cir. 2001) (stating that "the 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff;'" in order for the plaintiff to fulfill his burden, "substantial evidence" of pretext must be produced); *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2306 (1995) (describing the "judgment for plaintiff sometimes permitted" position as one where the combined evidence case allows a judgment for the plaintiff only in circumstances where such evidence is of sufficient strength to allow an inference of discrimination).

F. *Continuing Problems Regarding Sufficiency of the Evidence at Summary Judgment*

Most commentators and writings since *Reeves* have lamented the lack of liberalization of standards by courts and have called for clarification, or have reported generally about the circuit courts' reaction to the decision over the past year.[190] None, however, has addressed the real crux of the problem: despite all of the gyrations at the Supreme Court, we still do not know definitively how much circumstantial evidence of discrimination is enough to avoid summary judgment, which is apparent from Justice O'Connor's dance around the issue in her *Reeves* opinion when the issue was presented.[191] However, if one accepts the premise that the *Reeves* decision now allows all evidence present in the record to be considered when determining whether intentional discrimination has been proved, more objective measures for what constitutes "sufficient evidence" come to light.[192]

Prior to *Reeves*, the "pretext-plus" proponents took the position that once the defendant offered a justification for his actions, the presumption of discrimination created by the prima facie case literally disappeared, and was of no use.[193] Thus, in order for the plaintiff to combat the em-

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190. *See* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 601 (2001) (noting that since *Reeves*, many courts have not liberalized standards for plaintiffs regarding totality of the evidence); Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 771-72 (2001) (stating a conclusion that a clarification is needed in light of *Hicks* and *Reeves*).

191. *See Reeves*, 530 U.S. at 148-49 (opining that courts should not treat discrimination cases differently than other factual issues, but at the same time presenting a standard that allows discrimination to be inferred from facts relating only to the defendant's proffered justifications and the prima facie case). O'Connor further elaborates that the Fifth Circuit was reversed because of its presumption that plaintiffs must present evidence above and beyond the prima facie case in order to survive summary judgment. *Id.*

192. *See Reeves*, 530 U.S. at 152 (expressing an opinion that the lower court violated Rule 50 by disregarding evidence that would have been helpful to the plaintiff, and failing "to draw all reasonable inferences in favor of petitioner"); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 591-92 (2001) (stating that all evidence contained in the record should be used when ascertaining intentional discrimination, and further noting that the Fifth Circuit's downfall in *Reeves* was its failure to include all of the probative evidence contained in the record before determining whether the plaintiff had met its Rule 50 burden).

193. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993) (stating that once the defendant has met his burden, the *McDonnell Douglas* framework, and all of the presumptions associated with it are rendered irrelevant, the presumption created by the prima facie case "drops out of the picture"); *see also* Michael J. Zimmer, *Slicing &Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 587-88 (2001) (explaining that dicta from *Hicks* was the license courts took, including the Fifth Circuit, to require evidence above and beyond the combined evidence case). This commentator further explains

ployer's proffered justification, the employee was required to produce independent evidence that would prove the nondiscriminatory justifications false, and permit an inference that discrimination was at work.[194] *Reeves* apparently negates this entire rationale.[195] While it is clear that the plaintiff always bears the burden of convincing the trier of fact that the evidence supports a legitimate inference of discrimination, it is now quite arguable that all evidence contained in the record should be considered at the summary judgment phase.[196] Some might argue that this approach hinders the *McDonnell Douglas* framework's goal of narrowing the issues in circumstantial cases to the ultimate question of discrimination.[197] However, the current ad hoc approach allows courts to explain away as meaningless much of the plaintiff's evidence, leaving only evidence supporting the defendant's point of view.[198]

That said, it is intellectually dishonest to assume that all issues regarding sufficiency of the evidence will disappear just because all of the evidence is to be considered when ruling on a motion for summary judgment. To the contrary, this issue has perplexed scholars and com-

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that the justification behind the "pretext plus" interpretation was the language from *Hicks* suggesting that once the defendant offers a legitimate nondiscriminatory justification for his actions, the evidence supporting the prima facie becomes irrelevant vis-a-vis a presumption of discrimination, and thus additional evidence is necessarily required. *Id.*

194. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 582-83 (2001) (interpreting the actions of the Fifth Circuit in *Reeves*). Zimmer states:

> So what the court was saying finally is that the plaintiff introduced enough evidence to support drawing the inference that the defendant's reason was not the true reason for the defendant's action but had failed to prove the second part, that this false reason was used as a cover to hide its discrimination. Under the pretext-plus rule, more evidence was necessary before the jury could, upon sufficient evidence, draw the inference that defendant acted with an intent to discriminate.

Id.

195. *See Reeves*, 530 U.S. at 143 (redirecting the dicta from *Hicks*, and stating that although the presumption created by the prima facie case becomes irrelevant, the evidence supporting the prima facie case, and all of the inferences drawn from it, remain useful and relevant). The strength of the combined evidence case is determinative as to the existence of discrimination. *Id.* at 148-49.

196. *Id.*; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

197. *See Hicks*, 509 U.S. at 514 (stating that the Court does not have any authority to impose liability upon employers for discriminatory activities unless the trier of fact first finds, using "proper procedures" that discrimination has occurred; the Court may, however, establish procedures and orders of proof such as with *McDonnell Douglas*); *Burdine*, 450 U.S. at 253 (stating that the burden shifting framework serves to bring the litigants and courts to the ultimate question in any discrimination trial, whether the defendant has in fact discriminated against the plaintiff).

198. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 591-92 (2001).

mentators to the point that some have advocated a beheading of *McDonnell Douglas* altogether in favor of a straightforward approach where the only question at trial is whether the plaintiff has proved intentional discrimination by a preponderance of the evidence.[199] While such an approach would greatly simplify employment discrimination litigation, it would also serve to eliminate meritorious employment discrimination claims, particularly at the summary judgment phase.[200]

In light of *Reeves*, a more focused sufficiency of the evidence standard is needed to assist courts and practitioners in navigating the summary judgment landscape. In *Boeing Co. v. Shipman*[201] the Fifth Circuit promulgated a sufficiency standard for cases involving a judgment notwithstanding the verdict and a motion for a directed verdict.[202] This standard for allowing cases to proceed to the jury states that the court should, as alluded to in *Reeves*, consider all evidence contained in the record.[203] The standard itself states that if the facts of the case and the inferences drawn from those facts lean convincingly in favor of either the plaintiff or the defendant, such that the court feels that reasonable people could not legitimately reach a different verdict, the motion should be granted.[204] The court in *Boeing* further admonishes that motions ought not be decided based upon which party to the proceeding has more evidence, nor should motions be granted only when evidence is totally lacking.[205] The stated beginning point, however, before moving to any weighing of the evidence, is that "[t]here must be a conflict in substantial evidence to create a jury question."[206] The *Boeing* court further cautions that the jury, not judges, should consider and deliberate conflicting evidence and the inferences that come from this conflicting evidence.[207]

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199. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2317-18 (1995).

200. *See id.* at 2322-24 (cautioning that elimination of the *McDonnell Douglas* proof structures might make discrimination claims more difficult to litigate, could encourage the lower courts to establish their own standards regarding what evidence is sufficient to prove discrimination, and might have a negative symbolic impact by declaring that intentional discrimination cases have no special rules).

201. 411 F.2d 365 (5th Cir. 1969).

202. *See* Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

203. *See id.* (explaining that the court should look at the evidence); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (stating that although the presumption created by the prima facie case becomes irrelevant upon the defendant's proffering of a legitimate nondiscriminatory justification, the evidence supporting the prima facie case, and all of the inferences drawn from it, remain useful and relevant).

204. *Boeing*, 411 F.2d at 374.

205. *Id.* at 374-75.

206. *Id.* at 375.

207. *See id.* (asserting that it is the responsibility of the jury to weigh the evidence).

While the *Boeing* sufficiency standard does not necessarily apply to summary judgment cases, *Boeing* is cited in such cases for its direction on when a sufficiency issue arises, that is, when there is a substantial evidence conflict.[208] In *Rhodes*, the Fifth Circuit refined the *Boeing* standard in light of *Hicks*, and first held that in cases involving employment discrimination, evidence becomes substantial per *Boeing* when it permits reasonable fact finders to infer in a rational way that an impermissible trait was a determinative factor in the adverse employment action.[209] The court then clarifies its sufficiency standard by stating a standard that allows a finding of discrimination when (1) the plaintiff has created a fact issue regarding the justifications put forth by the defendant, and (2) has produced evidence sufficient to create a reasonable inference that an impermissible trait was determinative in the actions taken by the employer.[210] While this standard has helped to direct courts and practitioners, it is still quite amorphous and replete with opportunities for misapplication.

G. *A Sensible Solution Based on Precedent: Give it to the Jury*

In order to frame a more directed inquiry, the language of Rule 56(c) itself helps as a guide: summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."[211] In his *Rhodes* concurrence, Judge Emilio M. Garza notes that the holding in *Hicks*, "tells us specifically what evidence constitutes 'sufficient evidence' in the Title VII context."[212] He goes on to state that the fact that *Hicks* permits an inference of discrimination from the combined evidence case necessarily supports an ultimate verdict of discrimination based on sufficient evidence.[213] In other words, the combined evidence will always be substantial under *Boeing*.[214] Furthermore, if the combined evidence case is in fact "substantial

208. *See* Grimes v. Tex. Dep't of Mental Health & Mental Retardation, 102 F.3d 137, 141 (5th Cir. 1996) (stating that the "traditional sufficiency-of-the-evidence standard provides that there must be a conflict in substantial evidence to create a jury question"); LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996) (stating that a substantial evidence conflict must arise in order for a jury question to arise).

209. *See* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (defining the evidentiary standards in an employment discrimination case), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

210. *Id.*

211. FED. R. CIV. P. 56(c).

212. *Rhodes*, 75 F.3d at 997 (Garza, J., concurring).

213. *See id.* (arguing that when an inference of discrimination is allowed, a verdict of discrimination is supported by sufficient evidence).

214. *See id.* (noting that because *Boeing* directs that judgment as a matter of law should not be granted when there exists substantial evidence opposing the motion, and

evidence," both *Reeves* and *Boeing* instruct that the jury, not the courts, is to be entrusted with the role of weighing the evidence.[215] There is little or no precedent for the courts to "slice and dice" the plaintiff's evidence away as noncredible.[216] Indeed, if the plaintiff has credibly presented a combined evidence case, there is generally going to be a genuine fact issue for trial.[217] What must be prevented, and disposed of at the summary judgment phase, are those cases with only prima facie evidence and extremely weak evidence of pretext.[218]

How then, does the court determine, in light of a prima facie case, whether the plaintiff has produced "sufficient evidence" as required by *Reeves* which shows that the reasons proffered are false? The answer lies in *Boeing*, which states that "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury."[219] Thus, a plaintiff's case should survive a motion for summary judgment if (1) a plaintiff has presented evidence to support a prima facie case; and (2) has additionally presented admissible evidence showing that the defendant's legitimate nondiscriminatory justifications are false, such that reasonable people exercising fair and impartial judg-

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Hicks directs that the trier of fact can infer discrimination on the basis of the combined evidence, the combined evidence will thus always be "substantial" per *Boeing*).

215. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (stating that the Fifth Circuit in its *Reeves* opinion "impermissibly substituted its judgment concerning the weight of the evidence for the jury's"); Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969) (stating that "[i]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."), *overruled on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) .

216. *See Reeves*, 530 U.S. at 146 (admonishing the Fifth Circuit for operating with the presumption that the prima facie case plus evidence that the explanations proffered by the employer were false and insufficient to sustain a finding of discrimination).

217. *See id.* at 147 (stating that once the defendant's legitimate justifications have been eliminated, discrimination is the most likely alternative given that the defendant himself is in the best position to explain his actions); Evans v. City of Bishop, 238 F.3d 586, 591 (5th Cir. 2000) (stating that *Reeves* teaches that once the defendant's justifications have been rebutted, that showing is generally sufficient for the employee's case to survive a motion for summary judgment).

218. *See, e.g.*, Vadie v. Miss. State Univ., 218 F.3d 365, 373 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001) (discussing a case wherein the only evidence of discrimination presented by the plaintiff was that contained in his prima facie case); Moore v. Eli Lilly & Co., 990 F.2d 812, 817 (5th Cir. 1993) (noting that the plaintiff failed to introduce any evidence of pretext, either through his prima facie case or in response to the defendant's proffered nondiscriminatory justifications).

219. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969), *overruled on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

ment could reach differing conclusions regarding those proffered justifications.[220] This proposed test preserves the integrity of the *McDonnell Douglas* framework, comports with the *Reeves* decision, and allows cases with genuine factual issues to reach the jury where the evidentiary credibility decisions should be made.

IV. CONCLUSION

While the Fifth Circuit most recently has been correctly and dutifully stating the *Reeves* standard, it is also clear that not much has actually changed for plaintiffs after *Reeves*. While it is fair to say that the evidentiary burdens have been loosened somewhat, and the defendants' success ratio in summary judgment appeals is weakening, it remains the case that the plaintiff's combined evidence must be strong enough to allow a reasonable jury to infer discrimination. Indeed, this is the teaching of *Reeves* and *Hicks*. What is needed now is further clarification on what constitutes "sufficient evidence" vis-a-vis pretext. Without this clarification, courts will continue to impose their own credibility determinations upon the evidence contained in the record, rather than allowing that role to be fulfilled by the jury. The proposed standard suggested here, or one similar to it, would assist courts and practitioners a great deal in their adjudication and representation of parties in employment discrimination cases.

220. *Id.*; *see also Reeves*, 530 U.S. at 148 (stating that the prima facie case, in combination with sufficient evidence to show that the defendant's justification is untrue, can allow the jury to properly find that the defendant discriminated).